

Remarks

This Amendment responds to the Office Action dated 30 October 2009 in the above-listed matter. This Amendment is being filed within the three-month shortened statutory response period indicated by the Office Action, so no late fees are required. The present amendment does not change the total number of claims nor does it change the total number of independent claims. Accordingly, claims-related fees are not necessitated.

For the Claims:

Applicants originally submitted claims 1-20. In a first Office Action, dated 13 September 2005, claims 1-4, 6-10, and 17-20 were rejected, claims 5 and 11 were objected to as being dependent upon rejected base claims, and claims 12-16 were allowed. In an Amendment dated 18 February 2008, Applicants canceled claims 1-4, 6-10, and 17-20, amended the objected to claims 5 and 11, and retained claims 12-16 as originally submitted. As such, claims 5 and 11-16 remain pending.

This second Office Action now rejects all claims, i.e., claims 5 and 11-16. Applicants amend claim 14 and retain claims 5, 11-13, 15, and 16 as originally or previously submitted. Applicants respectfully request reconsideration in view of the claim modification and the following remarks.

In the 18 February 2008 Amendment, all rejected claims were canceled and the objected to claims 5 and 11 were amended to independent form to include all of the limitations of the base claim and any intervening claims, as suggested in the 13 September 2005 Office Action. Thus, amended independent claims 5

and 11 should have been found allowable. In addition, claims 12-16 were allowed in the first Office Action. Accordingly, a Notice of Allowance should have been forthcoming.

Instead, another search has now been conducted and the indicated allowability of claims 5 and 11-16 has been withdrawn in view of a newly discovered reference. This second Office Action was made final. Applicants respectfully assert that the finality of this second Office Action is improper. The Manual of Patent Examination and Procedures (MPEP) provides guidance for determining when a final rejection is proper on a second action, and therefore improper on a second action. As stated in the MPEP at 706.07(a):

Under present practice, second or any subsequent actions on the merits shall be final, except where the examiner introduces a new ground of rejection that is neither necessitated by applicant's amendment of the claims, nor based on information submitted in an information disclosure statement filed during the period set forth in 38 CFR 1.97(c) with the fee set forth in 37 CFR 1.17(p).

In this instance, the Examiner introduces a new ground of rejection, namely a Gethmann reference, U.S. Patent No. 3,392,801, to reject all pending claims, i.e., the previously objected to claims 5 and 11 as well as the previously allowed claims 12-16. Since the objected to claims 5 and 11 were amended to independent form, as suggested in the first Office Action, and since claims 12-16 remain unchanged as originally filed, the new ground of rejection presented in the second Office Action was not necessitated by Applicants' amendment of the claims. Furthermore, the Gethmann reference was not submitted by Applicants in an information disclosure statement. Rather, the reference is cited by the Examiner in the Notice of References Cited provided with this second Office Action.

For the above discussed reasons, the finality of this second Office Action is improper. Accordingly, Applicants respectfully request that finality of this second Office Action be withdrawn, the claim modification be entered, and the following remarks be fully considered.

This second Office Action apparently rejects claim 14 under 35 U.S.C. §112. Claim 14 recites the limitation "said post" in line 3. This second Office Action indicates that it is unclear to the Examiner as to which post the Applicants are referring to. As such, the Office Action requires correction.

It should be noted that independent claim 12, from which claim 14 depends, includes the features of "a first pair of vertical posts," "a second pair of vertical posts," "a post extending from an intermediate portion of said elongate member," and "said guardrail system including an upright support coupled with said post." Claim 14, as originally presented, includes the further limitation of "said upright support of said guardrail system is a tubular member exhibiting an inner diameter, and said post exhibits an outer diameter that is smaller than said inner diameter such that said post fits within said tubular member."

Applicants believe that it is clear that "said post" of claim 14 is the post extending from the intermediate portion of the elongate member due to its recited coupling with the upright support of the guardrail system in claim 12. As such, "said post" is not the recited "first pair of vertical posts," the "second pair of vertical posts," or even one post of the first or second pair of vertical posts. Nevertheless, claim 14 is being amended to address the Office Action concerns. That is, claim 14 is being amended to recite "...said post that extends from said intermediate portion of said elongate member..." to clearly distinguish the post from the first and second pairs of vertical

posts. Thus, Applicants respectfully request withdrawal of the indicated rejection of claim 14 under 35 U.S.C. §112.

This second Office Action rejects claims 5 and 11-16 under 35 U.S.C. 102(b) as being anticipated by Gethmann, U.S. Patent No. 3,392801. Gethmann discloses a scaffold device.

Regarding independent claim 5, the Office Action alleges that Gethmann discloses an access brace for a scaffold. The Office Action alleges that the Gethmann scaffold includes a pair of bearers 59, a platform 111, supported by the pair of bearers, and a guardrail system 21 for surrounding the platform. The Office Action indicates that these features are best seen in FIG. 1.

The Office Action further alleges that Gethmann discloses the features of claim 5 of an access brace comprising, an elongate member having a first and second end, first and second engaging means 67 coupled to the second end, the first and second engaging means being configured to engage with the pair of bearers; a first post 35 extending from an intermediate portion of the elongate member, the first post being located at a first distance from the first end of the elongate member; and a second post 35 extending from the intermediate portion of the elongate member, the second post being located at a second distance from the first end of the elongate member, the second distance being greater than the first distance, and the first and second posts being configured to couple with an upright support of the guardrail system.

Applicants disagree with the Office Action interpretation of the Gethmann system and the correlation of various elements of the Gethmann scaffold with Applicants' claimed access brace. That is, Gethmann fails to teach or suggest an access brace for a scaffold, as claimed in claim 5. Rather, the Office Action is

pointing to individual elements of the Gethmann scaffold and attempting to construe them as being elements of the claimed access brace.

Without acquiescing the propriety of the rejection under 35 U.S.C. §102 in view of Gethmann, brackets 59 may be considered a pair of bearers since they can support planks 111 (col. 4, lines 35-38). Similarly, planks 111 may be considered a platform since they provide a material supply area for bricks, blocks, mortar, etc. However, elements 21 and 21' are not a guard rail system as alleged in the Office Action. Rather, elements 21 and 21' simply make up part of the two vertical upright ends 11 and 11' of the scaffold. In particular, elements 21 and 21' are cross braces 21 and 21' that extend horizontally between upper portions of a pair of vertical legs 17 and 19 of each vertical upright end 11 and 11' of the scaffold (col. 2, lines 10-13). Furthermore, these two cross braces 21 and 21' are positioned at only two opposing ends of the platform, and are therefore not surrounding the platform.

Review of FIG. 1 reveals that the cross braces 21 and 21' may more appropriately be considered a pair of bearers for supporting the planks 111 on the topmost platform of the Gethmann scaffold because some planks 111 lie on top of the cross braces 21 and 21'. However, Gethmann fails to teach or suggest that these cross braces 21 and 21' are also, or alternatively, a guardrail system. Instead, Gethmann teaches of a guardrail system that includes guard posts 73 secured to an upper end of the legs 17 and 17' of the vertical upright ends 11 and 11', and a guard rail 85 extending between the guard posts 73 (col. 3, lines 1-16).

Regarding the claimed features of the access brace, the Office Action fails to cite passage(s) or associate reference numbers from Gethmann with the claimed elongate member having a

first end and a second end. As best understood, the Office Action shows a copy of Gethmann's Figure 1 calling out a "1st elongated post." This "1st elongated post" is leg 19 of vertical upright end 11 (see Gethmann, FIG. 6). A "2nd elongated post" is also called out in the Office Action copy of Gethmann's Figure 1. This "2nd elongated post" is leg 19' of vertical upright end 11' because vertical upright ends 11 and 11' are identical (col. 2, lines 13-16). Since the elements are identical, the reference numerals 11', 19', 21', and so forth are omitted hereinafter for clarity of discussion,.

Leg 19 is not part of an access brace. Rather, leg 19 forms an integral part of upright ends of the scaffold. For purposes of the following discussion, since leg 19 has a finite length, it follows that the leg 19 necessarily has a first end and a second end. The ensuing discussion will consider the end of leg 19 sitting on the ground as a first end and the opposing upper end of leg 19 as a second end.

The Office Action alleges that Gethmann teaches of a "first and second engaging means 67, coupled to said second end, said first and second engaging means being configured to engage with said pair of bearers." It appears that the Office Action insinuates a first engaging means 67 and a second engaging means 67 since two reference numerals are not cited. The Office Action further insinuates that both the "first and second engaging means 67" are coupled to the second end of the elongate member. Of course, claim 5 does not include such a limitation. Rather, claim 5 recites a first engaging means coupled to said first end (of said elongate member) and a second engaging means coupled to said second end (of said elongate member). Without more, the Office Action fails to provide structure in the Gethmann reference that anticipates Applicants' first and second engaging means of claim 5.

However, additional discussion will be directed to the Office Action allegation of the Gethmann element 67 being the engaging means of claim 5. As shown in FIG. 2, the Gethmann element 67 is a sleeve member 67 coupled to the bracket 59 (bearer) and is adapted to partially embrace the bottom surface of one of the Gethmann braces 29 that extend horizontally between the leg 19 and a vertically oriented brace 27 of the vertical upright end 11 (col. 2, lines 18-20, and col. 2, lines 64-65). Thus, the sleeve member 67 is coupled to a bracket/bearer 59 and is configured to engage with one of the braces 29, not to the "1st elongated post" (i.e., leg 19) of one of the vertical upright ends 11.

Furthermore, if the "1st elongated post" (i.e., leg 19) is somehow equated with the elongate member having first and second ends, it is clearly apparent that the sleeve member 67 as an engaging means is not coupled to a first end of the leg 19 nor to any structure (such as brace 29) at the first end of the leg 19. Nor is there another engaging means/sleeve member 67 coupled at a second end of the leg 19. Rather, a single element 67 on the bracket/bearer 59 is configured to engage near the leg 19, but on the brace 29, at some point intermediate between the ends of the leg 19.

The Office Action further alleges that Gethmann teaches of a first post and a second post as recited in claim 5. In particular, the Office Action points to a first post 35 extending from an intermediate portion of the elongate member (i.e., leg 19), the first post 35 being located at a first distance from the first end of the elongate member. This "first post 35" could be the bottommost of the two stubs 35 extending from the leg 19, as shown in FIG. 1. The Office Action points to a second post 35 extending from the intermediate portion of the elongate member (i.e., leg 19), the second post 35 being located at a second

distance from the first end of the elongate member, the second distance being greater than the first distance. This "second post 35" could be the uppermost of the two stubs 35 extending from the leg 19, as shown in FIG. 1. However, since leg 19 is not a fair teaching of Applicants' elongate member as recited in claim 5 and as discussed above, it follows that the Gethmann posts 35 cannot be a teaching of first and second posts, as recited in claim 5.

Moreover, claim 5 includes the claimed feature of the first and second posts being configured to couple with an upright support of the guardrail system. As discussed previously, the Gethmann guard posts 73 and guard rail 85 make up the Gethmann guardrail system. The Gethmann stubs 35 in no way couple with the upright guard posts 73. Furthermore, even if the cross brace 21 is somehow considered a guardrail system, which it is not, in no way are the stubs 35 configured to couple with the cross brace 21. Nor is the cross brace 21 in an upright orientation. Rather, the cross brace 21 is oriented horizontally since it interconnects the vertical legs 17 and 19 of the vertical upright end 11.

Anticipation requires that each element be taught in a single prior art reference and arranged as in the claim. As stated in Lindemann Maschinenfabrik GMBH v. American Hoist and Derrick Company et al., 221 USPQ 481, 485 (Fed. Cir. 1984):

Anticipation requires the presence in a single prior art reference disclosure of each and every element of the claimed invention, arranged as in the claim. In deciding the issue of anticipation, the trier of fact must identify the elements of the claims, determine their meaning in light of the specification and prosecution history, and identify corresponding elements disclosed in the allegedly anticipating reference.

As discussed in detail above, various elements of the Gethmann scaffold were correlated with the features of elements access brace of claim 5. When these various elements were analyzed individually and in combination with the other various cited elements, it became apparent that Gethmann fails to teach each and every element of claim 5, arranged as in claim 5. That is, the finding of anticipation rested on a series of mistakes. For example, the "1st elongated post" (i.e. leg 19) of the Gethmann reference does not correspond to an access brace including "an elongate member having a first end and a second end" as recited in claim 5. Nor does the sleeve member 67 coupled to the bracket 59 (bearer) of the Gethmann reference correspond to "first engaging means coupled to said first end; second engaging means coupled to said second end, said first and second engaging means being configured to engage with said pair of bearers" as recited in claim 5. Likewise, nor do the stubs 35 of the Gethmann reference correspond to first and second posts extending from an intermediate portion of the elongate member and configured to couple with an upright support of a guardrail system, as recited in claim 5.

The Gethmann reference discloses a scaffold composed of parts distinct from the access brace of the claimed invention. Furthermore, these distinct parts (e.g., leg 19, cross brace 21, bracket 67, and stubs 35) do not have the part-to-part relationships set forth in claim 5.

Accordingly, the rejection of independent claim 5 under 35 U.S.C. §102(b) in view of Gethmann was improper. Applicants respectfully request withdrawal of the rejection of claim 5 under the provisions of 35 U.S.C. §102.

Nor does the Gethmann scaffold render obvious Applicants' invention of claim 5. As taught in Applicants' specification, OSHA Regulations for Construction require fall protection for employees on scaffolds that are more than ten feet above a lower level (page 1, paragraph [0003]). As further taught in Applicants' specification, employees are to be protected by a guardrail system surrounding all open sides of a platform of the scaffold as specified under the Code of Federal Regulations, Title 29 (29CFR), Section 1926.451(g) Safety and Health Regulations for Construction (page 2, paragraph [0005]). Per convention, in order to access the platform of a scaffold with a guardrail system, a user may climb a ladder resting against the scaffold. The user then crawls through or over top rails and/or midrails of the guardrail system. Unfortunately, such a situation creates a fall hazard for the user who is attempting to climb over or through the rails.

Applicants solve the problem of providing a guardrail system surrounding the open sides of a scaffold platform while still enabling ready access to the scaffold platform through inclusion of an access brace that forms an opening in the guardrail system. Gethmann suffers from the very problems Applicants' invention of claim 5 solves. That is, Gethmann teaches of a guardrail system that includes guard posts 73 and a guard rail 85 arranged on only one side of the top scaffold platform. Thus, although there is ready access to that platform, the guardrail system on only one side of the platform does not provide the necessary safety of a guardrail system surrounding all open sides of a platform of the scaffold as specified under 29 CFR, Section 1926.451(g).

Gethmann also fails to suggest or otherwise imply anything resembling Applicants' claimed access brace for forming an opening in the guardrail system because the Gethmann scaffold platform is open on three sides. In other words, the three open

sides of the Gethmann platform preclude the need for an access brace. Unfortunately, however, those three open sides can present a significant fall hazard. As such, the scaffold configuration of Gethmann with its open scaffold platform clearly does not comply with 29CFR, Section 1926.451(g) Safety and Health Regulations for Construction.

Moreover, one would not be motivated to modify the scaffold of Gethmann to include a guardrail system surrounding the top scaffold platform. One would not be motivated because Gethmann expressly teaches of using the planks 111 extending between the brackets 59 (i.e., the middle platform) as a material supply area for bricks, blocks, mortar, etc. (col. 4, lines 35-37). Placement of a guardrail system surrounding the top scaffold platform would make it difficult, and potentially more hazardous, for a worker standing on that platform to reach the material supply area on the lower platform. Thus, Applicants' access brace of claim 5 is not obvious in view of Gethmann.

For the reasons set forth above, the subject matter of independent claim 5 is neither anticipated by, nor rendered obvious in view of Gethmann. As such, claim 5 is believed to be allowable as previously presented. Applicants respectfully allowance of claim 5.

Regarding independent claim 11, the Office Action now alleges that Gethmann discloses an access brace for a scaffold, the scaffold including a pair of bearers 29, a platform/support 111, supported by the pair of bearers, and a guardrail system 21 for surrounding the platform. It should be recalled that with respect to the rejection of claim 5, the Office Action alleged that Gethmann disclosed a pair of bearers 59. Thus, there is a lack of consistency in the Office Action regarding elements that are common to the independent claims.

As presented in connection with claim 5, the Office Action reiterates that Gethmann discloses an access brace comprising a first elongate member having a first and second end, first and second engaging means 67, coupled to said first and second end respectively, said first and second engaging means being configured to engage with said pair of bearers. The Office Action further alleges that Gethmann discloses an access brace that further includes a post 35, extending from an intermediate portion of the first elongate member, the post being configured to couple with an upright support of the guardrail system; a second elongate member arranged substantially parallel to the first elongate member, and a support 111 extending between the first and second elongate members for retaining the first and second elongate members in spaced relation, the support being arranged substantially perpendicular to the first and second elongate members and aligned with the post.

It should be noted that the Office Action alleges that planks 111 are both a platform and the claimed support. Without acquiescing the propriety of the rejection under 35 U.S.C. §102 in view of Gethmann, the planks may be a platform. However, the legs 19 do not correspond with the claimed first and second elongate members for reasons discussed in connection with claim 5. Furthermore, the planks 111 do not correspond with "a support extending between said first and second elongate members for retaining said first and second elongate members in spaced relation," as set forth in claim 11. Rather, it is the cross braces 15 extending between the opposite vertical upright ends 11 and 11' that function to retain the legs 19 and, correspondingly the legs 17, in spaced relation. The planks 111 merely serve a passive roll sitting upon but not physically secured to the braces 21. Without more, Gethmann fails to teach each and every element of claim 11, arranged as in claim 11 (Lindemann

Maschinenfabrik GMBH v. American Hoist and Derrick Company et al., supra).

In addition, independent claim 11 includes limitations similar to those set forth in claim 5. As such, claim 11 is believed to be allowable for reasons similar to those set forth in connection with claim 5. In particular, legs 19 and 19' (i.e., the 1st and 2nd elongated posts) do not correspond to "a first elongate member having a first end and a second end" and a "second elongate member arranged substantially parallel to said first elongate member" as recited in claim 5. Nor does the sleeve member 67 coupled to the bracket 59 of the Gethmann reference correspond to "first engaging means coupled to said first end; second engaging means coupled to said second end, said first and second engaging means being configured to engage with said pair of bearers" as recited in claim 11. Likewise, nor does the stub 35 of the Gethmann reference correspond to first and second posts extending from an intermediate portion of the elongate member and configured to couple with an upright support of a guardrail system, as recited in claim 11.

For reasons set forth above, Gethmann fails to teach each and every element of claim 11, arranged as in claim 11. Nor is Applicants' invention of claim 11 obvious in view of Gethmann for the reasons set forth above in connection with claim 5. Applicants respectfully request withdrawal of the 35 U.S.C. §102 rejection of claim 11 and additionally respectfully request allowance of claim 11.

Independent claim 12 includes subject matter directed toward a scaffold that includes a frame arrangement including first and second bearers, a platform supported by the bearers, an access brace having the features also recited in claim 5 including a post extending from an intermediate portion of an elongate

member, the post being located a predetermined distance from a first end of the elongate member. Independent claim 12 also includes a guardrail system surrounding the platform, the guardrail system including an upright support coupled with the post of the access brace, and the predetermined distance defining an opening in the guardrail system for access to the platform.

Regarding independent claim 12, the Office Action alleges that Gethmann discloses a scaffold comprising a frame arrangement that includes a first bearer and a second bearer 29, extending between a first pair of vertical posts, and a platform supported by said first and second bearers 41. It should again be recalled that with respect to the rejection of claim 5, the Office Action alleged that Gethmann disclosed a pair of bearers 59 and with respect to the rejection of claim 11, the Office Action alleged that Gethmann disclosed a pair of bearers 29. Now, with respect to the rejection of claim 12, the Office Action alleges that Gethmann discloses both first and second bearers 29 and first and second bearers 41. Again, there is a lack of consistency in the Office Action regarding elements that are common to the independent claims. Moreover, there is a lack of consistency regarding the same elements in a single claim, namely "bearers 29" and "bearers 41."

Now the Office Action alleges that the Gethmann reference discloses an access brace including an elongate member 45, having a first end and a second end, a first end hook 53, coupled to said first end and engaged with said first bearer, a second end hook 49, coupled to said second end and engaged with said second bearer 29, and a post 51, extending from an intermediate portion of the elongate member, said post being located a predetermined distance from said first end; and a guardrail system 21, surrounding said platform, said guardrail system including an upright support coupled with said post, and said predetermined

distance defining an opening in said guardrail system for access to said platform.

As mentioned above, with respect to the rejection of claim 5, the Office Action cited support brackets 59 as being bearers. Now the Office Action variously cites brace 29 and angle member 41 as being bearers. In addition, the Office Action implied that Gethmann disclosed an elongate member as being a "1st elongated post" (i.e., leg 19), in connection with claim 5. Now the Office Action alleges that the claimed elongate member is element 45. Likewise, the Office Action alleged that Gethmann disclosed engaging means as being sleeve member 67, in connection with claim 5. Now the Office Action alleges that the claimed first and second hooks (engaging means) are sleeve members 49 and 53. Furthermore, the Office Action alleged that Gethmann disclosed first and second posts as being stubs 35. Now the Office Action alleges that the claimed post is sleeve member 51.

The lack of clarity and consistency in the Office Action indicate a misrepresentation of what Gethmann actually teaches in an attempt to deprecate Applicants' invention. Nevertheless, for reasons presented below, Applicants respectfully assert that Gethmann fails to teach each and every element of claim 12, arranged as in claim 12. That is, the newly referenced elements are not a teaching of each and every element of claim 12. Furthermore, the newly referenced elements still do not have the part-to-part relationships set forth in claim 12.

Attention is now directed to the Office Action allegations of element 45 being an elongate member, element 49 being a second end hook, and element 53 being a first end hook. Element 45 is a vertically arranged brace of a walk support bracket 39 for the Gethmann scaffold (col. 2, lines 31-37). Brace 45 includes a

sleeve member 49 at one end and a sleeve member 53 at the other end, both of which have a hook-like appearance.

Sleeve member 49 could be considered to engage with one of the horizontal braces 29 (see FIG. 1). However, the sleeve member 49 does not "engage with" angle member 41. Rather, it appears to be permanently secured to the angle member 41 via welding, bolting, or some other means not specified (see FIG. 5 and col. 3, lines 38-41). Claim 12 includes the further limitation of the second end hook coupled to the second end (of the elongate member) and engaged with the second bearer. The sleeve member 53 clearly does not "engage with" either of the horizontal brace 29 or the angle member 41. Rather, the sleeve member 53 engages with the leg 19 (see FIGs. 1 and 5). Without more, Gethmann fails to teach each and every element of claim 12, arranged as in claim 12.

In addition, the Office Action now cites element 51 as being equivalent to the claimed post. The element 51 does not correspond to the post of claim 12. Rather, element 51 is an arcuate sleeve member secured to the brace 45 and it engages with or otherwise abuts the leg 19 (see FIGs. 1 and 5). The Office Action implies that the Gethmann brace 21 is somehow equivalent to the claimed guardrail system surrounding the platform. The brace 21 is not a guardrail system for reasons discussed above. Nevertheless, in an attempt to be fully responsive it is clearly apparent that the Gethmann brace 21 does not include an upright support coupled with the arcuate sleeve member 51. Nor does any portion of the Gethmann brace 21 couple with the sleeve member 51. As discussed previously, the Gethmann guardrail system includes guard posts 73 and guard rail 85. The arcuate sleeve member 51 in no way couples with any portion the guard posts 73 or guard rail 85 of the Gethmann guardrail system. Thus,

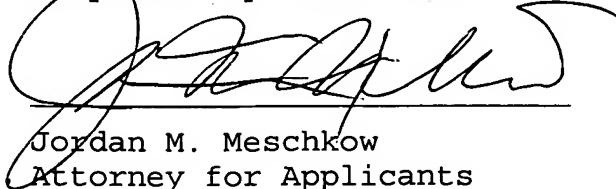
Gethmann fails to teach the features of the post and guardrail system arranged as in claim 12.

For at least the reasons set forth above, Applicants believe claim 12 to be allowable. Claims 13-16 depend directly or indirectly from claim 12 and are believed allowable at least by reason of dependency. Applicants respectfully request withdrawal of the 35 U.S.C. §102 rejection of claims 12-16 and respectfully request allowance of claims 12-16.

Accordingly, this Amendment amends claim 14. Currently amended claim 14 remains in the application and is believed to be allowable. In addition, claims 11-16 remain in the application as originally or previously submitted and are believed to be allowable.

Applicants believe that the foregoing amendments and remarks are fully responsive to the rejections and/or objections recited in the 30 October 2008 Office Action and that the present application is now in a condition for allowance. Accordingly, reconsideration of the present application is respectfully requested.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jordan M. Meschkow', is written over a horizontal line.

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